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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-957

JERRY EVANS, FRED HERMAN, and LARRY BERG,

Petitioners,

—v.—

LYNETTE ALICE FROMME and E. RICHARD WALKER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	3
Constitutional provisions involved	4
Statement of the case.	4
Reasons for granting the writ. .	7
I. This Court should grant certiorari to limit judicial restraint of protected speech relating to a criminal trial to that very rare case in which (A) the speech poses a serious and imminent threat to a fair trial, (B) the strong presumption against prior restraints can be overcome, and (C) no narrower alternative will suffice.	7
A. A "serious and imminent threat" to fair trial , ...	8
B. The strong presumption against prior restraints.	11
C. The absence of any narrower alternative	13

BLEED THROUGH

Subject Index (continued) Page

D. The District Court entered its injunction pursuant to the wrong substantive standard, in the absence of any evidence, and without considering narrower alternatives--particularly voir dire--to ensure against prejudiced jurors. 15

II. This Court should grant certiorari to encourage appellate review of gag orders, notwithstanding their expiration, as classic examples of short-term orders capable of repetition yet evading review. 17

Conclusion 21

TABLE OF AUTHORITIES CITED

Cases

	Page
Bantam Books, Inc. v. Sullivan 372 U.S. 58 (1963)	11
Bridges v. California 314 U.S. 252 (1941).	8, 10
Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968).	11, 19
C.B.S., Inc. v. Young 522 F.2d 234 (6th Cir. 1975) .	10
Chase v. Robson 435 F.2d 1059 (7th Cir. 1970).	10
Chicago Counsel of Lawyers v. Bauer, 522 F.2d 242 (7th Cir., 1975).	10
Craig v. Harney 331 U.S. 367 (1947).	9, 11
Gooding v. Wilson 405 U.S. 518 (1972).	13
Grayned v. City of Rockford 408 U.S. 104 (1972).	13
In re Oliver, 452 F.2d 111 (7th Cir. 1971) .	10
Irvin v. Doud 366 U.S. 717 (1961).	16
Moore v. Ogilvie 394 U.S. 814 (1969), ...	18

BLEED THROUGH

Table of Authorities Cited — Page

Cases (Continued)

Motor Coach Employees v. Missouri, 374 U.S. 74 (1963). . 18

Nebraska Press Ass'n v. Stuart, No. 75-817, O.T. 1975, cert granted, ___U.S. ___, 44 L.W. 3357 (Dec. 12, 1975). 4, 7, 8, 20

New York Times Co. v. United States, 403 U.S.713 (1971). 11, 12

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). 11, 12

Pennekamp v. Florida 328 U.S. 331 (1946) 9

Rideau v. Louisiana, 373 U.S. 723 (1963) 16

Roe v. Wade 410 U.S. 113 (1973) 18, 19, 20

Sheppard v. Maxwell 384 U.S. 333 (1966) 13, 14, 17

Southeastern Promotions, Ltd., v. Conrad, 43 L.Ed.2d 448 (1975). 12

Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 433 (1911). 17, 18, 20

Times-Picayune Publishing Corp. v. Schulingkamp, 42 L.Ed.2d 17 (1974)(Powell, J., on Application for Stay), appeal dismissed as moot, __U.S.__, 43 L.Ed. 2d 667 (1975). 8, 10

Table of Authorities Cited — Page

Cases (continued)

United States v. Dickinson
465 F.2d 496 (5th Cir. 1972). . 10

United States v. Fromme, ...
Cr. S-75-451 4, 7, 17

United States v. Schiavo,
504 F.2d 1 (1974) 20

United States v. Tijerina
412 F.2d 661 (10th Cir.),
Cert. denied 396 U.S. 990
(1969) 10

United States v. W. T.
Grant Co., 345 U.S. 629 (1953). 18

Wood v. Georgia
370 U.S. 375 (1962) 10

CODES

18 U.S.C. Sec. 1751(c) 4

18 U.S.C. Sec. 3161 et seq. . . 19

18 U.S.C. Sec. 3164(c) 19

28 U.S.C. Sec. 1254(1) 2

28 U.S.C. Sec. 1331 5

28 U.S.C. Sec. 1343 5

42 U.S.C. Sec. 1983 5

BLEED THROUGH

CONSTITUTION

	Page
United States Constitution	
First Amendment.	3, 4, 8, 9, 17, 19
Sixth Amendment.	4

MISCELLANEOUS AUTHORITIES

Comment, "Gagging the Press", 10 Harv.Civ.Lib.-Civ.R.L. Rev. 608 (1975).	20
Current Population Reports, United States Department of Commerce, Bureau of Census, Series p-26, No. 119, pp. 2-5 (May 1975).	6
Federal Rules of Civil Procedure, Rule 24	6
Freedom of the Press and Fair Trial: Final Report with Recommendations by the Special Committee on Radio, Television and the Administration of Justice by the Association of the Bar of the City of New York, 1967).	14
Rendleman, "Free Press-Fair Trial: Review of Silence Orders", 52 N.C.L.Rev. 127 (1973)	19
Report of the Committee of the Judicial Conference of the United States on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1968) .	14

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1975

No.

JERRY EVANS, FRED HERMAN, and
LARRY BERG, Petitioners,

vs.

LYNETTE ALICE FROMME and
E. RICHARD WALKER, Respondents

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioners Jerry Evans, Fred Herman, and Larry Berg, appellants below, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which dismissed their appeal from an order of the District Court for the Eastern District of California granting an injunction against the showing of the motion picture "Manson" on the ground that it might interfere with a fair trial for respondent Fromme.

BLEED THROUGH

OPINIONS BELOW

The order of the Court of Appeals dismissing petitioners' appeal is not reported; it is attached as "Appendix A" to this Petition. The opinion of the District Court, entitled "Findings and Injunctive Order", is not reported; it is attached as "Appendix B" to this Petition.

JURISDICTION

The order of the Court of Appeals dismissing petitioners' appeal was entered on November 14, 1975. A timely petition for rehearing was denied on December 23, 1975, and this Petition was filed within ninety days of that date.

This Court has jurisdiction under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. Whether, consistent with the First Amendment, a federal court may enjoin the showing of a documentary film in an area where more than two million people reside for the purpose of ensuring a fair criminal trial for one of its subjects, in the absence of any showing (A) that the film poses a serious and imminent threat to a fair trial, (B) sufficient to overcome the presumption against prior restraints, or (C) that no narrower alternative will suffice.

2. Whether judicial restraints on speech related to a criminal trial may be reviewed on appeal or certiorari, notwithstanding their expiration, as orders capable of repetition yet evading review.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, First Amendment, Free Speech and Press Clause:

> "Congress shall make no law ... abridging the freedom of speech, or of the press; ..."

United States Constitution, Sixth Amendment, Impartial Jury Clause:

> "In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury of the State and district wherein the crime shall have been committed..."

STATEMENT OF THE CASE

This is a "gag order" case, like Nebraska Press Ass'n v. Stuart, No. 75-817, O.T. 1975, cert. granted, ___ U.S.___, 44 L.W. 3357 (December 12,1975), in some respects, and provocatively unlike it in others. In this case, for the first time in American law, a criminal defendant has enjoined, in a separate civil action, the distribution and showing of a motion picture concerning her, on the ground that it might prejudice potential jurors in her criminal trial.

Respondent Fromme was very recently convicted by the federal District Court for the Eastern District of California of violating 18 U.S.C., § 1751(c), by attempting to assassinate the President of the United States. United States v. Fromme, Cr. S-75-451. On October 10, 1975, a month before jury selection began, respondent

Fromme and her then co-counsel, respondent E. Richard Walker, filed a civil action in the same court seeking to enjoin the showing of the documentary film "Manson," produced and distributed by Robert Hendrickson, Hendrickson Productions and Toban International Releasing, the original defendants in the civil action (No. S-75-682-TJM.) 1/

On October 17, 1975, the Honorable Thomas J. MacBride, Chief Judge of the District Court and the judge in respondent Fromme's criminal trial, viewed the film "Manson" in a hearing closed to the public. It is a documentary portrait of the "Manson Family" consisting of narration, editorial comment, and film of Manson family members (including respondent Fromme in a prominent supporting role) describing their lifestyle, backgrounds, subculture and philosophies. The film was shot in 1969, 1970, and 1971; all of it predates respondent Fromme's crime by years.

On that same day and without hearing any other evidence, the District Court entered its "Findings and Injunctive Order", (Appendix B) recognizing that the film is protected speech but reciting that respondent Fromme's right to a fair trial and petitioners' right to free speech were "irreconcilable" and that "the availability

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1/ Respondents claimed jurisdiction under 28 U.S.C., §§ 1331 and 1343; 42 U.S.C., § 1983; and "the inherent power of the Court to regulate pretrial publicity pursuant to Maxwell v. Sheppard, 384 U.S. 333 (1965)." Complaint, pp. 1-2.

BLEED THROUGH

of the film to the general public, which would include all of the prospective jurors in this case, could so increase the difficulty of selecting a fair and impartial jury that there is a high probability that defendant ... could be denied her right to both a fair and speedy trial." Appendix B, p. 3.

The District Court therefore enjoined the distribution and exhibition, and in part the advertisement, of the film in any of the 26 California counties from which the jury was to be drawn--counties having a combined population of more than two million people. 2/ The injunction was effective until a jury was sequestered or, if not sequestered, until it reached a verdict. Appendix B, p. 5-6.

On October 24, 1975, petitioners, interested members of the potential audience and residents of three of the affected counties, noticed motions under Rule 24, F.R.C.P., to intervene as defendants in the civil action and to reconsider and vacate the injunction. Six days later, on October 30, after argument on petitioners' motions but without taking any new evidence, the District Court granted petitioners' motion to intervene as defendants but denied their motion to reconsider and vacate the injunction.

Petitioners immediately appealed, and on October 31, 1975, sought in the Ninth

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2/ United States Department of Commerce, Bureau of the Census, Current Population Reports, Series p-26, No. 119, pp. 2-5 (May 1975).

Circuit an emergency stay of the injunction (No. 75-3390). On November 3, when relief was not forthcoming, petitioners filed with then Justice Douglas a similar application for a stay.

On November 4, 1975, the criminal trial of respondent Fromme began in the District Court. Four days later, on November 7, a jury had been selected and sequestered, and the injunction expired by its own terms. Neither of petitioners' applications had been acted upon.

On Monday, November 10, 1975, petitioners withdrew their pending application from this Court and attempted to do the same from the Ninth Circuit. That Court, however, on November 14, entered an order denying the application as moot "in light of the sequestering of the jury" in United States v. Fromme, and dismissing petitioners' appeal as moot. Appendix A. A timely petition for rehearing was denied on December 23, 1975, and this Petition followed.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO LIMIT JUDICIAL RESTRAINT OF PROTECTED SPEECH RELATING TO A CRIMINAL TRIAL TO THAT VERY RARE CASE IN WHICH (A) THE SPEECH POSES A SERIOUS AND IMMINENT THREAT TO A FAIR TRIAL, (B) THE STRONG PRESUMPTION AGAINST PRIOR RESTRAINTS CAN BE OVERCOME, AND (C) NO NARROWER ALTERNATIVE WILL SUFFICE.

This Court has already determined, by its grant of certiorari in Nebraska Press

BLEED THROUGH

Association v. Stuart, supra, that these issues are worthy of its plenary consideration; they present "a fundamental confrontation between the competing values of free press and fair trial, with significant public and private interests balanced on both sides." Times-Picayune Publ. Corp. v. Schulingkamp, 42 L.Ed.2d 17 (1974)(Powell, J., on Application for Stay), appeal dismissed as moot, ___U.S.___, 43 L.Ed.2d. 667 (1975).

This case demonstrates that the confrontation is nearly always more apparent than real, and that the competing values can nearly always be accommodated by strict application of First Amendment theory and careful procedural choice.

Three central First Amendment doctrines converge to illustrate the invalidity of the District Court's injunction. We take them up in turn.

A. A "serious and imminent threat" to fair trial.

This Court has consistently adhered to the principle that considerations of fair trial do not justify restrictions on otherwise protected speech absent a showing that the speech is a "serious and imminent threat"--frequently characterized as a "clear and present danger"--to a fair judicial proceeding. The cornerstone of the rule is Bridges v. California, 314 U.S. 252 (1941), in which the Court reversed two contempt convictions arising from out-of-court speech for failure of the record to demonstrate a "clear and present danger" to judicial impartiality. Id. at 263. Even in the context of the preservation of fundamental fairness, the Court held, the

First Amendment

> "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."
>
> Ibid.

Five years later contempt convictions for vitriolic criticism of judicial behavior were again reversed in Pennekamp v. Florida, 328 U.S. 331 (1946), in which the Court combed the record and again found it wanting:

> "We are not willing to say under the circumstances of this case that these editorials are a clear and present danger to the fair administration of justice in Florida.
>
> Id. at 348.

Confronted with the same problem in its next term, the Court once again reversed contempt convictions for out-of-court speech thought prejudicial to fair proceedings in Craig v. Harney, 331 U.S. 367 (1947), with this unequivocal reminder:

> "...freedom of speech and of the press should not be impaired... unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice.
>
> Id. at 373.3/

3/ Throughout its opinion the Court used interchangeably the phrases "serious and imminent threat" and "clear and present danger."

BLEED THROUGH

In Wood v. Georgia, 370 U.S. 375 (1962), this Court reversed a contempt conviction for statements allegedly endangering the operation of a grand jury. The clear and present danger standard first announced in Bridges was accepted by both the majority, id. at 384, and the two dissenters, id. at 399; letters critical of the grand jury proceedings were found by the majority to fail that very rigorous test.

True, none of these cases involved protection of a petit jury, but individual Justices and courts of appeal alike have since ruled that the same standards are applicable. Nebraska Press Ass'n v. Stuart, supra, 1975 CCH Sup.Ct.Bull. B 205, 217 (1975)(Blackmun, J., on Reapplication for Stay); Times-Picayune Publ. Corp. v. Schulingkamp, supra, 42 L.Ed. 2d at 23; CBS, Inc., v. Young, 522 F.2d 234, 238 (6th Cir. 1975); Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1970). See also Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 249 (7th Cir. 1975); United States v. Dickenson, 465 F.2d 496, 507 (5th Cir. 1972); In re Oliver, 452 F.2d. 111, 114 (7th Cir. 1971); Contra; United States v. Tijerina, 412 F.2d 661, 666 (10th Cir. 1969), cert. denied, 396 U.S. 990.

The strictness with which the standard is applied appears in this Court's continued insistence that any such restriction on speech be justified by specific findings supported by an ample evidentiary record. See, e.g., Wood v. Georgia, supra, at 382, 387, 393; Pennekamp v. Florida, supra, at 347-48, 350.

B. The strong presumption against prior restraints.

The test described above for the permissible supression of speech in the name of a fair trial, even by subsequent punishment, is stringent and rarely overcome:

> "The fires which [the speech] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."
>
> Craig v. Harney, supra, at 376.

But the rigor of that test increases exponentially when it is applied to a prior restraint, "because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system." New York Times Co. v. United States, 403 U.S. 713, 730-31 (1971) (White, J., concurring).

A court's injunction prior to expression is the classic prior restraint, New York Times Co. v. United States, supra, at 714; Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 181 (1968). "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); New York Times, supra, at 714; Carroll, supra, at 181. In order to overcome that presumption the government (and in this case respondents) "thus carries a heavy burden of showing justification for the imposition of such a restraint." Organization for a

BLEED THROUGH

Better Austin v. Keefe, 402 U.S. 415, 419 (1971); New York Times, supra.

> "The presumption against prior restraints is heavier--and the degree of protection broader--than that against limits on expression imposed by criminal penalties."
>
> Southeastern Promotions, Ltd., v. Conrad, ___ U.S. ___, 43 L.Ed.2d. 448, 459 (1975).

The element of likelihood required to justify a prior restraint on speech thus nears certainty:

> "...the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result."
>
> New York Times, supra, at 725-26 (Brennan, J., concurring.

> "...publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling a transport already at sea..."
>
> Id. at 726-27 (Brennan, J., concurring).

> "...I cannot say that [the Pentagon Papers] will surely result in direct, immediate, and irreparable damage to our Nation or its people."
>
> Id. at 730 (Stewart, J., concurring).

C. The absence of any narrower alternative.

It is now elementary that speech may not be infringed, inter alia, if any narrow, less intrusive alternative will suffice to protect the governmental interest involved. Grayned v. City of Rockford, 408 U.S. 104 (1972); Gooding v. Wilson, 405 U.S. 518 (1972).

This Court's opinion in Sheppard v. Maxwell, 384 U.S. 333 (1966), recognized that principle because it rejected an invitation to examine the propriety of direct restraints on media publication, finding that several available methods of limiting prejudicial publicity, not used by the trial judge, would have sufficed:

> "...the judge never considered other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press..."
>
> Id. at 358.

BLEED THROUGH

Sheppard invited courts to "take such steps by rule or regulation that will protect their processes from prejudicial outside interferences," identifying several such steps. Id. at 363. This suggestion was taken seriously by bench and bar; it produced at least three major studies of possible preventive measures, chief among which was the "Kaufman Report", officially known as the Report of the Committee of the Judicial Conference of the United States on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1968). It reflects two years of study by the full Committee and its Subcommittee to Implement Sheppard v. Maxwell, and contains numerous specific suggestions for solution of the problem--among them regulation of public discussion by attorneys and all other courthouse personnel, control over the seating and conduct of spectators and media personnel, a ban on television and radio in the courtroom, and more liberal use of traditional techniques such as continuance, change of venue, voir dire, sequestration of jurors and witnesses, and cautionary instructions.

In these respects the Kaufman Committee agreed with and relied heavily upon the report of the "Medina Committee",4/

4/ Freedom of the Press and Fair Trial: Final Report with Recommendations by the Special Committee on Radio, Television and the Administration of Justice of the Association of the Bar of the City of New York (Columbia University Press, 1967).

a blue-ribbon panel of the New York Bar which had recently studied the same issues, and the "Reardon Committee", 5/ a similar panel of the American Bar Association.

All three groups considered and rejected the approach used by the District Court here--direct restraint on media publication--in favor of the less intrusive procedural alternatives mentioned above.6/ The District Court here failed to use, and even to consider, many of these techniques, most notably that of careful screening of jurors in voir dire--an error to which we now turn.

D. The District Court entered its injunction pursuant to the wrong substantive standard, in the absence of any evidence, and without considering narrower alternatives--particularly voir dire--to ensure against prejudiced jurors.

The District Court found that the film posed "a high probability that [respondent Fromme] could be denied" a fair trial. Appendix B, p. 3. That this substantive standard was far too lax is demonstrated by the discussion in Parts A and B, supra. After petitioners intervened, the District Court orally announced another finding: that the film "poses a serious and imminent threat to the possibility" of a fair trial7/,

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5/ American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press (Tentative Draft, 1966).

6/ Kaufman Committee, 45 F.R.D. at 4020-03; Reardon Committee, p. 69; Medina Committee, p. 45.

7/ Transcript of Hearing, Oct. 30, 1975, p. 14.

BLEED THROUGH

thus pyramiding a threat and a possibility, and diluting the correct standard beyond utility.

Nor, if the District Court had announced the correct standard, would this record--which consists of the film alone--support a finding that the film was a "serious and imminent threat" to the fairness of respondent Fromme's trial. No inquiry beyond the four corners of the film was made--not even into its likely circulation or the counties in which it was intended to be shown. Findings of a prejudiced jury require far more specific inquiry. See, e.g., Rideau v. Louisiana, 373 U.S. 723, 724 (1963)(statistical analysis of number of people in jury pool to whom film shown); Irvin v. Dowd, 366 U.S. 717, 727 (1961)(statistical analysis of percentage of jury panel having preconceived views).

Of critical importance, however, is the District Court's nearly total inattention to the usefulness of voir dire to separate from the jury those who may have been prejudiced by seeing the film. The twenty-six California counties from which the jury was drawn have a combined population of more than two million[8/]. The suggestion that enough of those prospective jurors would see a documentary on Charles Manson to render impossible the selection of a fair jury is startling--and wholly unsupported in the record.

But if the District Court's failure to consider whether the film would be seen by too many of those two million people is startling, its acceptance of voir dire to cure potential prejudice caused by many other sources of publicity is inexplicable. Respondent Fromme was, after

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[8/] See note 2, supra.

all, on trial for attempting to assassinate the President of the United States. She was featured on the covers of Time and Newsweek, has an important role in the best-selling book Helter Skelter by Vincent Bugliosi, and was the subject of massive television and radio coverage before and during the trial. Nonetheless, it took the District Court less than a week to select and sequester a jury it must have thought unprejudiced by this massive publicity. United States v. Fromme, supra. If voir dire could adequately ensure an impartial jury in those circumstances, the presence of one nonfiction film in such an enormous jury pool could hardly have made a difference.

The failure of the District Court to examine the adequacy of voir dire to ensure an impartial jury, as in Sheppard, supra, at 357, and thus to pursue an alternative less intrusive of First Amendment rights than preventing the offering of the film to more than two million people, renders the injunction invalid whatever the record might otherwise have revealed about a "serious and imminent threat" to the fairness of respondent Fromme's trial.

II.

THIS COURT SHOULD GRANT CERTIORARI TO ENCOURAGE APPELLATE REVIEW OF GAG ORDERS, NOTWITHSTANDING THEIR EXPIRATION, AS CLASSIC EXAMPLES OF SHORT-TERM ORDERS CAPABLE OF REPETITION YET EVADING REVIEW.

In Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911), the appellants sought to enjoin an Interstate Commerce

BLEED THROUGH

Commission order requiring them to desist from giving undue preference to a carrier. The order had expired before the case reached this Court but the suggestion of mootness was rejected: "The questions involved...are...continuing and those considerations ought not to be, as they might be, defeated by short term orders, capable of repetition." 219 U.S. at 515.

The Southern Pacific rule has been recently and consistently followed where claims of mootness are made to frustrate review of orders that expire quickly due to events but are likely to recur. In Motor Coach Employees v. Missouri, 374 U.S. 74 (1963), the appellant union challenged a governor's proclamation ending a public transit strike and taking possession of the transit system. Although the proclamation was withdrawn while the appeal was pending, the Court reached the merits, rejecting the argument of mootness because a controversy continued concerning appellants' rights and appellees' powers and the Governor could again attempt to assert those powers. 374 U.S. at 78. See also United States v. W.T. Grant Co., 345 U.S. 629 (1953).

In Moore v. Ogilvie, 394 U.S. 814 (1969), this Court heard and decided a challenge to Illinois election laws notwithstanding the fact that the election had been held. The claim of mootness was tersely rejected since the case dealt with the fundamental right of the franchise and was "capable of repetition, yet evading review".

In Roe v. Wade, 410 U.S. 113 (1973), this Court struck down state abortion laws at the behest of a woman who was

pregnant when the suit was begun but not when it reached the high court. Rejecting a mootness claim, the Court pointed out, in language appropriate here, that the problem of pregnancy (like criminal trials) will "always be with us" and the issues it poses are "capable of repetition, yet evading review". Id. at 125.

The exception to normal mootness doctrine is especially applicable where First Amendment rights are at stake. In Carroll v. President and Commissioners of Princess Anne, supra, this Court struck down a state court order restraining for ten days the members of the National States Rights Party from holding a public assembly. The order had long since expired, but the Court ruled the issue of sufficient importance and the underlying controversy of sufficient persistence to justify the conclusion of non-mootness.

Because of the Speedy Trial Clause and the new Federal Speedy Trial Act, 18 U.S.C., §§ 3161 et seq.,8/ gag orders will necessarily expire within a very short period of time, and must therefore be reviewed on emergency motion or similar proceeding (which petitioners attempted here) or not at all, unless the claim of mootness is rejected. See generally Rendleman, "Free Press-Fair Trial: Review of Silence Orders", 52 N.C.L.Rev. 127 (1973). Such orders abound in lower

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8/ Respondent Fromme, for example, was confined for lack of funds to post bail, and would have been entitled to release if not brought to trial within ninety days. 18 U.S.C., § 3164(c).

state and federal courts but there is very little appellate law concerning their validity, precisely because they are short-term orders which cannot be appealed in the ordinary course of events. See generally Comment, "Gagging the Press", 10 Harv.Civ.Lib.-Civ.R.L. Rev. 608 (1975). Unless appellate courts either review such orders while they are in effect or consider them after they have expired, those orders will be essentially unreviewable.

For these reasons the Third Circuit reached and decided the merits of a silence order notwithstanding the fact that it had lapsed in United States v. Schiavo, 504 F.2d 1 (1974), holding that "this case is reviewable as a dispute 'capable of repetition, yet evading review'", and citing Southern Pacific and Roe v. Wade, both supra. 504 F.2d at 5.

The issue of mootness presented herein is identical to that presented by Nebraska Press Ass'n v. Stuart, supra, in which the order expired at the commencement of the criminal trial on January 5, 1976. This Court denied a motion to expedite consideration of Nebraska Press but granted certiorari notwithstanding the imminent expiration of the order; Mr. Justice White's views indicate "agreement that [the Court] should not attempt to hear and decide this case prior to the beginning of the criminal trial..." 44 L.W. at 3357 (December 12, 1975).

CONCLUSION

For the aforementioned reasons, petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

DATED: January 6 , 1976

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